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February 17.

FULL BENCH.

Before Sir John Stanley, Knight, Chief Justice, Mr. Justice Sir William Burkitt, and Mr. Justice Aikman.

MUNIR-UN-NISSA AND OTHERS (DEFENDANTS) *v.* AKBAR KHAN (PLAINTIFF).*

Act No. XV of 1877 *(Indian Limitation Act), schedule II, Articles* 111 *and* 132—*Limitation—Act No. IV of* 1882 *(Transfer of Property Act), section* 55 (4) (*b*)—*Suit by vendor to enforce charge for unpaid balance of purchase money.*

Held that a suit for the enforcement of the payment of purchase money by sale of the purchased property is a suit to enforce a statutory charge differing from the lien which an unpaid vendor in equity possessed for the recovery of the balance of his purchase money and that the article of the Limitation Act applicable is article 132 and not article 111. *Webb* v. *Macpherson* (1), *Har Lal* v. *Muhamdi* (2) and *Ramakrishna Ayyar* v. *Subrahmania Ayyen* (3) followed. *Baldeo Prasad* v. *Jit Singh* (4) overruled.

THE plaintiff in this case, one Akbar Khan a Tahsil chaprasi, purchased certain property at auction for Rs. 25. Finding some difficulty in getting possession of the property, the purchaser consulted a pleader of the name of Nazir Husain, and the result of their consultation was that the property was sold to the pleader's wife Musammat Munir-un-nissa, for the sum of Rs. 4,000. This sale took place on the 31st of August 1892. On the 29th of August 1904, Akbar Khan instituted the present suit, admitting the receipt of Rs. 400 out of the consideration money, and asking for a decree for Rs. 3,600. The Court of first instance (Subordinate Judge of Saharanpur) gave the plaintiff a decree for Rs. 3,600. The defendants appealed. The lower appellate Court (District Judge of Saharanpur) with some modifications affirmed the decree of the Court of first instance and dismissed the appeal. The defendants appealed to the High Court. On the question whether or not the plaintiff's suit was barred by limitation the appeal was referred by order of the Chief Justice, dated the 3rd of January 1908, to a bench of three Judges.

* Second Appeal No. 990 of 1906 from a decree of L. M. Stubbs, District Judge of Saharanpur, dated the 24th of July 1906, modifying a decree of Nihal Chandra, Subordinate Judge of Saharanpur, dated the 28th of March 1906.

(1) (1903) I. L. R., 31 Calc., 57.
(2) (1899) I. L. R., 21 All., 454.
(3) (1905) I. L. R., 29 Mad., 305.
(4) Weekly Notes, 1891, p. 130.

Mr. *B. E. O'Conor*, Mr. *Muhammad Ishaq Khan* and Babu *Jogindro Nath Chaudhri*, for the appellants.

Mr. *A. E. Ryves*, Mr. *Abdul Raoof* and Dr. *Tej Bahadur Sapru* for the respondent.

STANLEY, C.J., and BURKITT and AIKMAN, JJ.—This appeal arises out of a suit brought by a vendor to enforce payment of the balance of his purchase money by sale of the purchased property. The main question raised in the appeal is whether article 111 of schedule II to the Limitation Act, or article 132 is applicable to the case. Article 111 provides for a suit brought by a vendor of immovable property to enforce his lien for unpaid purchase money and the period given for the institution of a suit under that article is three years. Article 132 provides for a suit to enforce payment of money charged upon immovable property, the period allowed for the institution of such a suit being 12 years. It is admitted that if article 111 is applicable to this case the suit is barred, but if article 132 applies the suit has been brought within time.

The respondent's case is that the suit is not a suit to enforce a lien within the meaning of article 111, but is a suit to enforce a statutory charge created by section 55 of the Transfer of Property Act. The Courts in this country have taken varying views upon this question, the Bombay High Court holding that article 132 was the article applicable to a case of the kind, whilst, until quite recently, the Madras High Court held that the article applicable was article 111. In this High Court there were also conflicting decisions. In the case of *Baldeo Prasad* v. *Jit Singh* (1), Edge, C.J., and Tyrrell, J., held that article 111 was applicable. But in a later case we find a carefully considered judgment delivered by the late Sir Arthur Strachey, the Court consisting of himself and Banerji, J., ruling that article 132 applied. This was the case of *Har Lal* v. *Muhamdi* (2). In a recent case in the Madras High Court—*Ramakrishna Ayyar* v. *Subrahmania Ayyen* (3)—the question was again considered, and in view of a statement of the law by their Lordships of the Privy Council in a recent case, to which we shall presently

(1) Weekly Notes, 1891, p. 130. (2) (1899) I. L. R., 21 All., 454.
(3) (1905) I. L. R., 29 Mad., 305.

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refer, the Court held, overruling the previous decisions, that article 132 was the article applicable to a suit of the kind. The case to which the learned Judges in that case referred is the case of *Webb* v. *Macpherson* (1). In that case their Lordships, at pp. 71 and 72, referred to section 55 of the Transfer of Property Act, which provides that "in the absence of a contract to the contrary * * * the seller is entitled, where the ownership of the property has passed to the buyer before payment of the whole of the purchase money, to a charge upon the property in the hands of the buyer for the amount of the purchase money or any part thereof remaining unpaid and for interest on such amount or part." A number of English authorities were cited to their Lordships in that case, and dealing with these authorities they observed, at page 72:—"No doubt English cases might be useful for the purpose of illustration, but it must be pointed out that the charge which the vendor obtains under the Transfer of Property Act is different in its origin and nature from the vendor's lien given by the Courts of Equity to an unpaid vendor. That lien was a creation of the Court of Equity and could be modified to the circumstances of the case by the Court of Equity. But in the present case there is a statutory charge. The law of India, speaking broadly, knows nothing of the distinction between legal and equitable property in the sense in which that distinction was understood when equity was administered by the Court of Chancery in England, and the Transfer of Property Act gives a statutory charge upon the estate to an unpaid vendor, unless it be excluded by contract. Such a charge therefore stands in quite a different position from a vendor's lien." In view of this language of their Lordships it appears to us that we must take it as settled that a claim such as that referred to in the present case for the enforcement of the payment of purchase money by sale of the purchased property is a statutory charge differing from the lien which an unpaid vendor in equity possessed for the recovery of the balance of his purchase money and that therefore the article of the Limitation Act applicable to this suit is article 132.

A minor question which has been raised in the appeal is that, the suit having been dismissed as regards one of the defendants

(1) (1903) I. L. R., 31 Calc., 57.

Nazir Husain, he should have been exempted from the payment of costs. In view, however, of the relationship of Nazir Husain to the vendee, this is not a case in which we should interfere with the decision of the Court below on the question of costs.

The only other remaining question which has been brought to our notice is the following, namely, it is alleged by the vendee that she paid in respect of prior incumbrances upon the purchased property a considerable sum of money, exceeding, we are told, the balance of the purchase money due by her, and she claims a right to set off the money so paid against a like amount of the purchase money. The deed of purchase has been translated for us, and so far as we can gather there is no provision in it that the vendee should be liable to pay off subsisting charges. On the contrary, the property appears to have been sold free from incumbrances; certainly there is no mention of any existing incumbrances. One of the duties of a vendor, as prescribed by section 55 of the Transfer of Property Act, is to discharge, amongst other things, all incumbrances on the property existing at the date of the sale except where the property is sold subject to incumbrances. It therefore appears to us that the vendee is entitled, if she paid any prior incumbrance which the vendor was liable to pay, to set off the amount so paid against a proportionate part of the balance remaining unpaid of the purchase money or against the entire balance if the amount so paid was equal to or exceeded the balance. Whether or not any money has been paid in respect of prior incumbrances by the vendee has not been ascertained. The learned District Judge says in the course of his judgment that "if it be found that the defendant appellant is entitled to a set-off on this head, it will be necessary to have this point determined, as the lower Court has recorded no finding upon it." In the view which the learned District Judge took he did not go into this question. We think he ought to have done so, and before we finally determine this appeal we must refer an issue under the provisions of section 566 of the Code of Civil Procedure for determination by him. The issue will be:—

> Whether or not at the date of the sale to the vendee appellant, any incumbrances on the purchased property were outstanding, and if so, whether the defendant vendee

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has paid any, and if so, what amount in discharge of those incumbrances?

We accordingly refer this issue to the lower appellate Court, and we shall ask that Court to determine it with the utmost expedition. The Court will take such relevant evidence as the parties may tender. On return of the finding seven days will be allowed for filing objections. We shall reserve the question of costs for the final hearing.

[On this issue it was found that Munir-un-nissa had paid somewhat more than the amount of the unpaid purchase money. The appeal was accordingly decreed, and the plaintiff's suit dismissed with costs on the 7th of April, 1908.]

Appeal decreed.

APPELLATE CIVIL.

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February 18.

Before Mr. Justice Banerji and Mr Justice Richards.

NITA RAM (OBJECTOR) *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL (OPPOSITE PARTY).*

Act No. I of 1894 *(Land Acquisition Act), section* 49 *—"House, manufactory or building"—Acquisition of part only required—Whether whole must be purchased.*

Land which is not a house, manufactory or building in the literal sense, and which is not reasonably required for the full and unimpaired use of a house, manufactory or building cannot be considered as part of the "house, manufactory or building" within the meaning of section 49 of Act No. I of 1894. Whether or not the land is so reasonably required is a question of fact depending upon the particular circumstances of each case. *Khairati Lal* v. *The Secretary of State for India in Council* (1) distinguished.

THE facts of this case are as follows:—

The Government were acquiring, under the powers conferred by the Land Acquisition Act, 1894, a small piece of land at the end of a garden occupied by one Nita Ram. The piece of land was situate at one corner at the extreme end of the garden which was used in connection with a house. Nita Ram objected that, inasmuch as the piece of land was part of the garden, it was a part of the house within the meaning of section 49 of the Land Acquisition Act and that he was entitled to insist that the

* First Appeal No. 43 of 1906 from a decree of L. G. Evans, District Judge of Saharanpur, dated the 18th of December 1905.

(1) (1889) I. L. R., 11 All., 378.